RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.

CHARLES KURTZ ET AL. *v.* JOHN HIBNER ET AL.

Where a testator in unambiguous language devised a lot in section 32 of the town of Joliet, parol evidence is not admissible to show that he meant a lot in section 31.

For the purpose of determining the object of testator's bounty or the subject of disposition, parol evidence may be received; but in this case the devise was certain both as to object and subject, and the court could not look beyond the instrument itself.

In a bill for a partition of land devised by a father, parol testimony is admissible to show that one of the parties (a daughter) has been in possession of part of the land, and has made valuable improvements under a promise by testator to convey. Such evidence is not to affect the will, but the rights of parties under it, and the daughter is entitled to have the part improved by her set out in her purpart, or to be allowed for her improvements if partition cannot be thus made.

THIS was a bill for partition filed by John Hibner and others, children and heirs at law of John Hibner, deceased, against Charles, Elizabeth, and James Kurtz.

The bill alleged, that by the death of the deceased, complainants and defendants, except James, became seised in fee as tenants in common of the W. ½ S. W. ¼ sec. 33, T. 35, R. 10, E. 80 acres, and the S. ½ E. ½ S. E. ¼ 32, T. 35, R. 10, E. 40 acres: that Elizabeth was entitled to the undivided one-sixth part of the lands; that James claimed title to the forty-acre tract, and that Elizabeth is a daughter of the deceased, and the wife of Charles.

The appellants answered, admitting the allegations of the bill, except as to the intestacy of Hibner; and averred that he devised the eighty acre tract to Elizabeth, and the forty acres to James; that there was a misdescription of the lands in the will, and that Charles and Elizabeth had been in possession of, and made valuable improvements upon, the eighty-acre tract, upon the promise of the deceased that he would give the same to Elizabeth.

The usual replication was filed, cause heard, and decree rendered for partition.

To reverse this decree, appellants brought the case to this court.

The Circuit Court refused to hear parol evidence to explain the language of the will. The only provisions of the will to be considered are the following:—

3d. I give and bequeath to my daughter, Elizabeth Kurtz, all that tract or parcel of land situate in the town of Joliet, Will county, Illinois, and described as follows: The west half of the south-west quarter, section thirty-two, township thirty-five, range ten, containing eighty acres, more or less, together with all the appurtenances thereunto belonging or in anywise appertaining.

"7th. I give and bequeath to my grandson, James Kurtz, all that part or parcel of land described as the south half of the east half of the south quarter, section thirty-one, in township thirty-five, range ten, containing forty acres, more or less."

Appellants offered to prove that testator, at the time of his death, owned only one eighty-acre tract in township thirty-five, which was the one described in the bill; that a mistake was made in drafting the will, by the insertion of the words, "section thirty-two," instead of section "thirty-three;" that Charles and Elizabeth Kurtz had been in the actual possession of the tract for a number of years; and upon the repeated promise of the testator in his lifetime that he would give the same to Elizabeth, had made lasting and valuable improvements at their own expense on the land; had fenced it, and erected thereon a dwelling-house, barn, and corn-cribs, dug wells, and set out fruit-trees.

Appellants also offered to prove that James Kurtz, at the time of the death of the testator, was in the actual possession of the forty-acre tract as the tenant of the deceased, and that the draftsman of the will, by mistake, inserted the word "one" after the words "section thirty," instead of "two," so as to bequeath to James land in section thirty-*one*, instead of section thirty-*two*. This evidence was rejected by the court on the hearing.

D. H. Pinney, for appellants.

W. C. Goodhue, for appellees.

The opinion of the court was delivered by

THORNTON, J.—It has been strongly urged by counsel that the evidence offered by appellants should have been received for the purpose of ascertaining the intention of the testator.

The will devises land to Elizabeth in section thirty-*two*; the parol evidence offered was for the purpose of locating the land in section thirty-*three*.

The will devised to James the south half of the east half of the south quarter of section thirty-one.

It was proposed to show by parol evidence that the testator intended to devise to James the south half of the east half of the south-east quarter of section thirty-two.

The law requires that all wills of land shall be in writing; and extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of the testator's bounty or the subject of disposition, parol evidence may be received to enable the court to identify the person or thing intended.

In this regard the evidence offered afforded no aid to the court. The devise is certain, both as to the object and subject. There are no two objects—no two subjects.

The intention of the testator must prevail. How shall this be ascertained? In the case of *Smith* v. *Bell*, 6 Peters 74, Chief Justice MARSHALL says: "The first and great rule in the exposition of wills, to which all rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. This principle is asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be the legal declaration of a man's intentions, which he wills to be performed after his death. These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law."

The thing devised is certain and specific; section, township, and range are given. The evidence offered as to the mistake in the section would have made a new and different will. The testator devised lands in certain sections. The description is full, certain, and explicit. No doubt arises upon the reading of the will. Every mind is forced to the same conclusion, that the land devised, the subject of disposition, is clearly and without the slighest ambiguity described.

The language is not applicable to any other land. No extrinsic evidence, then, is needed to identify the thing intended. The intention is manifest from the words of the will.

The case of *Tucker et al.* v. *Seamans' Aid Society*, 7 Met. 188, is cited by appellants' counsel. It appeared in that case that in consequence of incorrect information the legatee was not probably the object of the testator's bounty. Other societies claimed the legacy. The court, however, decided that the legacy should be paid to the "society" designated in the will, not upon extrinsic proof, but upon the words of the will.

The case of *Riggs* v. *Myers*, 20 Mo. 239, is also cited by counsel for appellants. That case is very different from the one under consideration. The testator in that case made a full disposition of all his estate, and there described certain lands, locating them in a township in which he owned no lands. The land intended to be devised was, however, identified by reference to the "big spring" upon it.

In the case before the court there is no disposition, either specifically or generally, of the lands in bill mentioned.

We think, therefore, there was no error in refusing the admission of extrinsic evidence to detract from or add to the terms of the will. The law requires the will to be in writing, to be executed in the presence of two witnesses and with certain solemnities, to insure its correctness and protect the testator from mistake and imposition.

There is no ambiguity in this case, as is urged. When we look at the will it is all plain and clear. It is only the proof *aliunde* which creates any doubt; and such proof we hold to be inadmissible: *Doe* v. *Hiscocks*, 5 Mees. & Welsby 363; *Miller* v. *Traverce*, 8 Bing. 244; *Jackson* v. *Sill*, 11 Johns. 212; *Jackson* v. *Wilkinson*, 17 Id. 146; *Mann* v. *Mann*, 1 Johns. Ch. 231.

The decree in this case must, however, be reversed for the refusal of the court to admit the evidence offered, as affecting the rights and interests of the parties in making the partition. By the decree, the court found that Elizabeth Kurtz was entitled to the undivided one-sixth part of the lands, without any direction to the commissioners to assign to her the portion improved, and in case partition could not be made to allow her a reasonable remuneration from her co-tenants who received the benefit of the improvements. This was error: *Louvalle et al.* v. *Menard et al.*, 1 Gilman 39; *Dean et al.* v. *O'Meara et al.* 47 Ill. 121; *Borah* v. *Archer*, 7 Dana 176.

It would be inequitable to permit the complainants to share in

the benefits of the improvements without making some compensation to the defendants for the necessary increased value to the land occasioned by the improvements.

As to the eighty-acre tract, we think from the evidence offered that Elizabeth Kurtz is entitled to specific performance of the parol promise repeatedly made by her father. Appellants offered to prove such parol promise by the testator in his lifetime to Elizabeth, and that in consequence of such promise possession was taken and extensive and valuable improvements made by them. A court of equity will always enforce a promise upon which reliance is placed, and which induces the expenditure of labor and money in the improvement of land. Such a promise rests upon a valuable consideration. The promissee acts upon the faith of the promise.

We can perceive no important distinction between such a promise and a sale. Courts would sanction wrong and fraud not to sustain such a promise. If the proof offered can be made, then Elizabeth is entitled to specific performance, and a decree for the conveyance of the eighty acres to her upon the filing the proper bill: *Bright et al.* v. *Bright*, 41 Ill. 97; *Sheppard* v. *Bevin*, 9 Gill 32; *King's Heirs* v. *Thompson*, 9 Peters 204.

We do not think that James Kurtz has any title to the forty acres by virtue of the will or otherwise, and partition should be made of it.

Decree of the Circuit Court is reversed, and the cause remanded with instruction to that court to proceed in accordance with this opinion, and with leave to Elizabeth to file her cross-bill.

We regret the necessity of dissenting, so entirely as we must, from the argument and conclusions of the learned judge in the foregoing opinion. But if we say anything, we must, of course, say what we think; and even silence is liable to misconstruction. From the general doctrine of the case, that oral proof is not admissible to explain or vary the words of a written instrument, there could be no dissent. But there are so many exceptions and qualifications of the rule, that no case is ever tried, where the force, operation and construction of a written intrument are concerned, that oral evidence is not received in aid of its construction. To such an extent is this true, that it would be impossible for any court to fix the construction of a will in such a manner as to make any reasonable approximation to the truth of the instrument, without the admission of such evidence. For the court, then, to throw themselves back upon the general rule, and reject all oral proof, upon the broad ground that the will must speak by its words, is much the same as

refusing to receive oral proof in any other case where the matter rests wholly in parol, and practically amounts to a denial of justice. We understand well enough, of course, in the present case, that the court felt compelled to reject the evidence offered, and that if there had been, in their apprehension, any clear way to admit it they would gladly have so done.

If the ground upon which the evidence was offered, is fully stated by the judge iu giving the opinion, it is not improbable the court may have fallen into the misapprehension, partly on account of the true ground of the admissibility of the evidence not being fully or understandingly stated at the time the evidence was offered. Commonly, where evidence is offered, upon a ground and for a purpose for which it is not admissible, it is not error in the court to reject it, although upon other grounds, and for other purposes, it might have been admissible. But the rejection of the evidence here is not placed upon any such narrow ground. The court seemed to suppose the evidence not admissible for any purpose, or upon any ground.

The court say, indeed, that the evidence was offered by the appellants for the purpose of showing that the will was by mistake drawn differently from what the testator intended. That precise point was immaterial, and the evidence was not, strictly speaking, admissible for that purpose. That would be to add a new term to the will by making it read, in terms, as the testator would have had it made, if he had recollected the number of the sections in which his lands lay, which can never be done. And the rule, excluding oral proof in explanation of written instruments, applies to the *language* of the instrument, and not to its import or construction: 1 Greenl. Ev. § 277. But nothing is more common, or we might say universal, than to receive oral proof to show, that language was used in a peculiar sense, or that one term was used for another, or that an essential term, to make the definition perfect, was wholly omitted or erroneously stated. These corrections, so to speak, are every day made by courts, in fixing the construction of wills and other written instruments, by the aid of extraneous evidence in regard to the state and condition of the subject-matter of the devise, or of the devisee, or of the testator in regard to the one or the other. But for this latitude of construction, and the aid thus derived from oral proof, the administration of the law would become but a succession of blunders in the dark. The familiar illustration of a promissory note expressed, "I promise *not* to pay," &c., will occur to all. The court found no difficulty in holding it a valid note, and a promise *to pay*. The case of *Wilbar* v. *Smith*, 5 Allen 194, well illustrates the practice of the courts in supplying a word omitted. The word "residue" was there wholly omitted in the residuary clause, which was perfect in all other respects, providing that the legatees, who had received particular legacies, should receive in proportion to their former legacies, but did not say what they should receive. There could be but one answer to this question, and that was, the residue of the estate, and the court so held. And one would blush for the lameness of the law, and of its administration, if the court had done otherwise. The books are filled with similar cases. And the present case, when properly considered, and fully comprehended, is one of precisely the same character, except that it is attended with far less difficulty than the one last cited. Here the description is entirely sufficient, and more than sufficient, if we confine ourselves to the particulars, which are truly stated. The description would have been sufficient by merely naming the township in

which the land lay; and in many cases a devise of a right of land is held valid, without fixing the location within any particular township even; as in *Townsend* v. *Downer*, 23 Vt. 225, where the description was, "a certain right of land I purchased, lying on the main, supposed to be in Vermont;" and the registry of titles in the town of Burlington, Vermont, showing a right of land standing in the name of the testator, the court held the devise applied to that until it appeared the testator held some other right in the state to which the words would apply. Testators too often depend upon memory, in describing lands in their wills, and are by consequence liable to great indefiniteness, and occasional error. And the courts have, for a long period of years, felt compelled to deal with these descriptions in a very lenient manner, and to reach the intent of the testator, where that seemed practicable, by the act of construction and by the admission of oral evidence to remove latent ambiguities.

One rule upon the subject is so thoroughly established as to have become a maxim in the law, *falsa demonstratio non nocet*. The practical meaning of this maxim is, that however many errors there may be in the description, either of the legatee or of the subject-matter of the devise, it will not avoid the bequest, provided enough remains to show, with reasonable certainty, what was intended: *Roman Catholic Orphan Asylum* v. *Emmons*, 3 Bradf. Sur. Rep. 144; *Jackson* v. *Sill*, 11 Johns. 201, 218, at which latter page Mr. Justice THOMPSON, a very high authority, describes the force and extent of the maxim *falsa demonstratio non nocet*, and shows very clearly, that in a state of facts like those in the principal case there is not the slightest difficulty in giving effect to the devise. The language of the learned surrogate, BRADFORD, in 3 Sur. Rep. 148 *et seq.*, is very pertinent to the present case, and entirely decisive in favor of the devisees. See also 1 Redfield on Wills 580, *et seq.* and cases cited, where, we trust, it sufficiently appears, that the former decisions are all opposed to the one now before us.

In the principal case, there could be no question of the admission of oral evidence to show the state and extent of the testator's property, in order to place the court in the same position the testator was at the time he made the will. No reasonable man could question this upon the decided cases. This being done, it appears the testator had no such land as that described, in the particular sections named. This rendered it clear, absolutely certain, we may say, that the sections named were erroneous and could have no possible operation, and must be rejected. The devise then was the same as if the sections had not been named at all, or had been named, leaving the numbers blank. We are then compelled to fall back upon the remaining portion of the description, "eighty acres of land in range ten, in township thirty-five," and "forty acres of land in range ten, in township thirty-five;" and, upon inquiry, we find precisely such pieces of land "in range ten, in township thirty-five," belonging to the testator. This renders the devise as certain as it is possible to make it. The description would not have been one whit more clear or certain, if the true sections had been stated; nor is it in fact rendered any more uncertain by the insertion of sections 31 and 32, instead of 32 and 33. It is entirely certain, from the language of the will, what the testator must have intended, in either form. He could not have intended to devise land to which he never had any title; he must have intended to devise land which did belong to him. He had two just such pieces of land as he names, and

every way described as these are, with the single exception of this *one false particular*. It is the very case to which the maxim, *falsa, &c.*, applies, and to which alone it can apply. The cases are almost innumerable where similar errors have occurred; and we cannot find a single case where any such decision as that of the principal case has been made. There are any number of cases where similar and far more doubtful devises have been upheld. We should scarcely feel justified in setting forth any considerable number of them, but some few may serve to show how other courts have viewed similar cases, and although it may not enable the court to do justice in this case, it will, we trust, persuade this court and all others not to follow the case as an authority.

In *Allen* v. *Lyons*, 2 Wash. C. C. Rep. 475, the devise was of a house and lot in *Fourth* street, Philadelphia. But it appeared on oral proof, admitted by the court, that the testator had no such property in *Fourth* street, but did own a house and lot in *Third* street, and it was held to pass under the devise; a case so precisely in point that no one can argue against its application and control of this case.

In *Winkley* v. *Kaime*, 32 N. H. 268, the devise was of "thirty-six acres, more or less, of lot 37, in the second division of Barnstead;" and it appearing that there was no such lot in that division, but that the testator owned land in lot 97, in that division, it was held to pass under the will. This case, too, is precisely in point, since there being no such number, and the testator not having any land in it, is the same. And the case of *Myers* v. *Riggs*, 20 Mo. 239, which the court seem to regard as different from the principal case, in its principle, seems to us essentially the same. The fact that the actual location of the land devised is sufficiently identified by reference to natural objects upon it is not different in principle from its identification by the remaining portion of the description. All that is required in any such case is that enough of the description shall be correct, to enable the court to see clearly what was intended. And in regard to that there can be no question in the principal case. It would not be rendered any more certain by reference to any number of natural objects on the land. So that, in fact, the last case cited is precisely in point, and of controlling authority in the principal case.

There are a great number of cases in the books where the name of the devisee, whether a natural person or a corporation, is defectively described, that involve the same principle as the principal case. In *The Domestic and Foreign Missionary Society's Appeal*, 30 Penna. St. 425, the devise was to the "missions and schools of the Episcopal Church about to be established at or near Point Cresson," and it appeared the mission was maintained by the "Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States;" and this society was held entitled to receive the bequest. And in *Button* v. *The American Tract Society*, 23 Vt. 333, a similar departure from the exact description was held not fatal to the devise. In these and many similar cases the description found in the will has to be rejected, almost every word of it, and the bequests are given to corporations almost wholly dissimilar in name, upon the ground that there being but one claimant, and that one sufficiently identified by the erroneous description, it is proper he should take rather than the bequest be held wholly void.

In an earlier period of the history of this rule of evidence, excluding oral proof in regard to the import and construction of written instruments, there may be found an occasional case where

bequests have been held void upon some such grounds as those relied upon in the principal case. But in modern times no such results are allowed except from the most inevitable necessity. And it seems almost incomprehensible how any such misapprehension of the established rules of evidence and construction could have occurred in the present case. But unless we have spent our life, and studied the books, to small purpose, there is surely some fatal miscarriage in this case. The recent decision *In re Gregory*, 11 Jur. N. S. 634, is a very marked one, going much further than is required to sustain the devise in the principal case; and we might continue to cite cases without end fully sustaining our views; but we have said enough if to the purpose, and, if not, the less said the better. We have not alluded to the slight variation in the descriptions between "south" and "southeast," because it is not relied upon in the decision, and is of no possible importance in any view, since the precise import of the points of compass, when used in a general way, and not upon actual survey, is never rigidly applied in construction, but regarded only as an approximation.

We trust we have not failed to express our views in regard to the foregoing case with all that moderation and respect which is due to the decision of so learned and able a court, and which we most sincerely feel. But that the decision is fatally and flagrantly erroneous there can be no more question or doubt than of the axioms of geometry or the propositions in the most exact sciences. There is no proposition in the law of evidence more unquestionable than that the evidence offered was admissible in aid of the construction, and that with that aid the devise should have been upheld.

I. F. R.

United States Circuit Court. Western District of Pennsylvania.

ALEX. NIMICK ET AL. *v.* MUTUAL LIFE INSURANCE CO.

A provision in a policy of life insurance that it shall be void if the assured "shall die by his own hand," includes all kinds of voluntary self-destruction. If the assured commit suicide, comprehending the physical nature and consequences of his act and intending to destroy his life, the policy is void, though he may not have been able to comprehend the moral nature of the act.

In an action on such a policy, the burden is first on the insurer to show that the insured died by his own hand; and this being done, it then rests upon the plaintiff to prove that the insured was of such insane mind that he did not commit the act with the knowledge and intent that it should result in death.

THIS was an action upon a policy of life insurance. The facts sufficiently appear in the charge of the court.

John Barton and *J. H. Bailey*, for plaintiff, cited *Breasted* v. *Farmers' L. and T. Co.*, 4 Hill 73; s. c. 4 Selden 299; *Estabrook* v. *Union Mut. L. Ins. Co.*, 54 Me. 224; *St. Louis Mut. L.*